No. 15276-77

United States Court of Appeals
For the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL and PACIFIC RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, GREAT NORTHERN RAILWAY COMPANY and NORTHERN PACIFIC RAILWAY COMPANY, *Appellants,*

vs.

ALOUETTE PEAT PRODUCTS, LTD., *et al.*, *Appellees.*

INTERSTATE COMMERCE COMMISSION, *Appellant,*

vs.

ALOUETTE PEAT PRODUCTS, LTD., *et al.*, *Appellees.*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

REPLY OF RAILROAD APPELLANTS TO BRIEF OF APPELLEES

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We will reply to the arguments of the appellees in the order stated in their brief:

I.

The appellees first argue that the Interstate Commerce Commission (hereinafter called "Commission") violated its own rules when it granted the railroads' second petition for reconsideration. The basis for the appellees' contention that the Commission violated its own rules in granting the second petition for reconsideration is that all that the Commission did in deciding *F. W. Bolgiano & Co., Inc. v. Baltimore & O. R. Co.,*

291 I.C.C. 659, was to reach a result contrary to the result first reached in the instant case (appellees' brief pg. 9), and the decision in the *Bolgiano* case merely constitutes a "change of heart," or "some quirk or change in administrative policy," by the Commission (appellees' brief pg. 11).

The second decision in the *Bolgiano* case constituted much more than a change of heart or mere quirk or change in administrative policy by the Commission. As we pointed out by the cases cited on pages 20 and 21 of our opening brief, the Commission as early as 1913, in *Brown & Sons Lumber Co. v. L. & N. R.R. Co.*, 37 I.C.C. 507, and down through the years until the first decision in the instant proceeding, uniformly and consistently adhered to the principle of law that where carriers tender tariffs which are accepted and filed with the Commission, the rates named therein become effective according to the terms of the tariff, even though the tariff should have been rejected on tender because the carriers in tendering the tariff violated some outstanding order of the Commission; and that shippers were not entitled to damages by reason of such violation in the absence of proof that they were damaged thereby.

In the initial decision in the instant proceeding, the Commission for the first time held that when tariffs are filed that violate some requirement of the Commission, shippers not damaged by such violation may recover damages on the theory of unjust enrichment. It was and is our opinion that the Commission in so deciding was wrong. We therefore determined to test the validity of this decision by requiring the shippers to sue

under 49 U.S.C.A. Sec. 16(2) to enforce the order requiring the payment of reparations. However, prior to the time a suit was instituted to enforce the order, the Commission, on reconsideration in the *Bolgiano* case, rejected the doctrine that it could award damages on the theory of unjust enrichment, and again adhered to the theretofore long-established doctrine that in the absence of proof of damage, shippers were not entitled to recover damages.

Since the Commission had retreated from its incorrect decision when it decided the *Bolgiano* case on reconsideration, we concluded we should give the Commission an opportunity to correct the same error in the instant proceeding. We did this by filing our petition for leave to file a second petition for reconsideration. The rejection by the Commission of the erroneous doctrine of unjust enrichment and its re-adherence to long-established legal principles in the second decision in the *Bolgiano case,* certainly constituted changed circumstances and new grounds for reconsideration. Good cause was shown for leave for the rail carriers to file their second petition for reconsideration. Since good cause was shown, and the second petition was based on new grounds and a substantial change in circumstances, the Commission, in granting leave to file the second petition for reconsideration, complied with its own rules.

II.

In Part II of their argument, the appellees contend that the railroads in our opening brief have asserted that under the Commission's order in Ex parte 162, the rail

carriers "... had authority to vary the statistical commodity listings as they saw fit" (appellees' brief, pg. 12). At the bottom of page 12, they state, "The Commission never had the slightest intention that the individual carriers could vary the commodities commonly reported under these group numbers and place such commodities under other classifications, thus subjecting them to different freight rates."

The appellees have misconstrued our argument. We did not and do not contend that the Commission in its Ex parte 162 order permitted the carriers to vary the statistical commodity listings as we saw fit. Our contention, as set forth on pages 11 to 14 of our opening brief, is that the Commission, under a fair interpretation of the language it used in prescribing the manner of applying the increases authorized by its order in Ex parte 162, intended that the increases generally should apply to commodities as listed in the statistical grouping; that where there was a reasonable basis for deviations from a strict adherence to the commodity statistical grouping, the Commission intended that such deviations should and would be made; that under the circumstances here presented, good grounds existed for a deviation from a strict adherence to the commodity statistical grouping, and therefore the application of a 20 per cent increase to these peat rates was permissible under the Commission's order.

III.

Under Part III of their argument, the appellees argue that the tariffs which named the rates the shippers paid, were never published. On page 15 they say,

"In short, there is no publication of any kind here, and the rates are, therefore, null and void." They do not directly challenge the findings of the Commission in the initial decision (T. 324), and in the second decision (T. 342), that the carriers published and filed tariffs with the Commission effective January 1st, 1947, increasing their tariff charges by 20 per cent. The record, of course, is clear that the rail carriers did publish and file tariffs increasing their charges by 20 per cent, effective January 1st, 1947 (T. 258-259); and the fact that the carriers published tariffs naming these increases effective January 1st, 1947, was admitted by the shippers' counsel when he appeared as a witness at the hearing (T. 214). The Examiner asked this same witness the following question (T. 198):

> "EXAM. HALL: Well, now, let me ask you, on January 1, 1947, this 20% increase, was that a temporary increase or was it a permanent increase?
>
> "THE WITNESS: It was a nation-wide, permanent increase. It was incorporated in the rate structure at that time; it was not temporary."

There is no question on this record that the rail carriers published and filed tariffs effective on 5 days' notice naming a 20 per cent increase in the rates here considered, and that these rates became effective on January 1st, 1947. The Commission, in both the initial decision and the second decision in this case, has held that these tariffs, since they were on file with the Commission, named the only applicable rates. We think it is clear from a reading of Section 6 of the Interstate Commerce Act (Title 49 U.S.C.A. Sec. 6) that the Com-

mission was correct in its holding that where it accepts and files tariffs, the rates named therein become the only applicable rates. Sub (9) of that section provides as follows:

> "The Commission may reject and refuse to file any schedule that is tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Commission shall be void and its use shall be unlawful."

It is evident from this section that it is only where a tariff is *rejected* by the Commission that it becomes void and of no effect. On the other hand, there is no rule relating to transportation that is more firmly settled than the rule that there can be no deviations by carriers from their tariffs that are *filed* with the Commission.

The appellees argue (appellees' brief, pg. 14):

> "The purpose of the statute (49 USCA Sec. 6, sub (3)) is, of course, to give notice to the public and to allow them to protest and suspend rates prior to their taking effect."

This statement is completely unsupported by any authority. The fact is, the requirement that tariffs should be filed with advance notice was contained in the original Interstate Commerce Act, in Section 6 of the Act to Regulate Commerce of February 4, 1887, 24 Stat. at L. 381. This requirement was in the Act long prior to the time the Commission had any power to suspend rates. The Commission's power to suspend a rate was first granted by Congress in the Mann-Elkins Act of June 18, 1910 (36 Stat. at L. 552, Sec. 12). The original Act as enacted in 1887 (24 Stat. at L. 381, Sec. 6) pro-

vided that no increase could be made in rates except after 10 days' public notice. This Act was amended in 1889 (25 Stat. at L. 856, Sec. 1), and then required the same 10 days' notice for an increase in rates and 3 days' notice for a decrease in rates. The 30-day notice requirement of any change in rate came into the Act by the Hepburn Act of June 29, 1906 (34 Stat. at L. 586, Sec. 2). Consequently, the 30-day notice requirement was in the Act for four years prior to the time the Commission had any power to suspend rates. As we have pointed out in our opening brief, the provision for public notice is to prevent discrimination and secret changes in rates, and it was not inserted for the purpose here contended for by the appellees, *i.e.*, to give shippers an opportunity to seek suspension.

If it be assumed that the carriers in publishing these rates on 5 days' notice violated the order of the Commission in Ex parte 162, and these shippers were thereby deprived of an opportunity to ask for suspension of the rates, this fact in no way damaged these appellees. Under Section 6 of the Act, shippers are entitled to have carrier rates published and on file with the Commission. This was done. Under Section 1 the shippers are entitled to reasonable rates. The rates, when increased by 20 per cent, were well below maximum reasonable rates. Hence this section was complied with. Under Sections 2 and 3, the shipper is entitled to a non-discriminatory and non-prejudicial rate. We have already in our opening brief demonstrated that the rates here assailed were not discriminatory nor prejudicial. What these appellees complain of is not that any act of the railroads did them damage, but that

the railroads in filing these rates violated an order of the Commission. If we did violate the order of the Commission, the railroads must answer to the Commission for this violation, and shippers cannot recover for this violation unless they were damaged.

These shippers stand in no different position than any other shipper under the Interstate Commerce Act. Irrespective of the manner in which rates come into being, when they are filed with the Commission, they become the applicable rates. When tariffs are filed with the Commission, and by their terms become effective, the tariffs then name the applicable rates. The shippers here, like any other shipper, have the full right under Title 49 U.S.C.A. Sec. 13, to file a complaint against existing rates, and if they are damaged by such existing rates, the Commission is authorized to award them monetary damages. These shippers have pursued that remedy. The fact that they were not entitled to ask for a suspension of these rates has deprived them of nothing; for if these rates in fact damaged them, they stand to recover those damages under Section 13, the same as any other shipper. The Commission denied the appellees' complaint because they did not, and could not show they were damaged.

The only authority appellees cite in support of their position that the rates assessed were inapplicable is *Illinois Central R. Co. v. Van Duesen-Harrington Co.,* 170 Minn. 488, 212 N.W. 940. The court's holding in that case was based on a misreading of the Supreme Court's decision in *Davis v. Portland Seed Co.,* 264 U.S. 403, 68 L.ed. 762.

IV.

Under Part IV of their brief, appellees argue that the weight of the evidence shows the rates to be unreasonable. The only evidence to which they refer is that the prior rates were voluntarily established, and had been in effect for some years (appellees' brief, pg. 21), and they then argue that this raises a presumption that these rates were reasonable.

The only other evidence mentioned by the appellees as supporting their contention is that peat does not require any special equipment, and that claims are not made on peat shipments. The contention that peat shippers do not file claims is based on the statement of one witness as to the experience of his company only, and did not purport to cover all shippers (appellees' brief, pg. 23; and T. 241).

The foregoing is appellees' summary of the evidence the appellees assert constitutes the overwhelming weight of the evidence that demonstrates the rates are unreasonable (appellees' brief, pg. 24). On the other hand, appellees admit the revenue from the rates was low (appellees' brief, pg. 23).

The facts that rates have been in effect for some time, that the carriers voluntarily decreased the rates after having increased them, and these shipments present no unusual cost features such as the need for special equipment, or large and numerous claims for damage, do not constitute evidence that the rates are unreasonable. The Commission's finding that there is no evidence that can be said to afford a sound basis for a finding of unreasonableness (T. 386) is fully supported by the record.

The appellees admit there is evidence that the rates are reasonable (the low revenues from the rates), and the most that they can argue is that there is some other evidence that bears on the reasonableness of the rates. In this circumstance, the question as to whether this other evidence should be considered, or is persuasive, is for the Commission and not this court. The Commission has done its duty when it found on the evidence that the assailed rates were reasonable. This finding must be accepted by the court. *Interstate Com. Com. v. Union P. R. Co.,* 222 U.S. 541, 56 L.ed. 308.

These appellees, and the trial court (Finding of Fact VII), assume that there is an obligation on the part of the carriers to guarantee that these shippers can profitably reach markets 3,000 to 3,500 miles away from their points of production in the face of competition located 1,000 miles from the same markets (T. 330). There of course is no such obligation. The only duties required of common carriers by the Interstate Commerce Act is to transport at reasonable, non-discriminatory and non-prejudicial rates. All this these appellees received.

The carriers, even if they were not authorized to increase their rates in the manner in which they did, still did not breach any duty to these shippers, or violate any of their rights. These shippers have not been wronged, and since they paid only a reasonable charge for the service they received, they were not damaged.

Nor are the rates shown to be prejudicial under Section 3. By their own admission, all the appellees have shown is that their rates were increased 20 per cent

while their competitors' rates were increased 6 cents per hundred (appellees' brief, pg. 25). This showing does not meet the requirements of Section 3 of the Act, Title 49 U.S.C.A. Sec. 3 (1). It presupposes that the appellees' rates and those of their competition were properly related before the increase. The appellees had no knowledge as to whether this was so, since they simply took the rates as they found them (T. 235), and argue that to increase one by 20 per cent and the other by 6 cents is prejudicial.

The appellees submitted no proof that the rates they were charged were unreasonably related to the rates charged their competitors. They offered no evidence as to the similarity or dissimilarity of the service or other transportation conditions. Nor did they prove that the defendants had it within their power to remove the claimed preferential and prejudicial relationship by raising the lower charges rather than lowering the higher charges. Unless the carrier charged with a prejudicial rate has this power, it did not create a prejudicial situation within the meaning of Section 3(1). *Texas & P. R. Co. v. United States,* 289 U.S. 627, 77 L.ed. 1410; *Union Pacific Railroad Co. v. United States of America,* 132 F.Supp. 72. Reversed in part on other grounds, *Denver & R.G.W.R. Co. v. Union P. R. Co.,* 351 U.S. 321, 100 L.ed. 1220.

Nor did the appellees show they were damaged. All that they showed was that their rates were increased by 20 per cent, and their competitors' rates were increased by 6 cents per hundred, and ask to be awarded the difference between the prior rates increased by 6 cents and the 20 per cent which was applied. This is not

enough. *Interstate Com. Commission v. United States,* 289 U.S. 385, 77 L.ed. 1273.

The fact is that, mileage considered, these appellees received more favorable treatment than their competitors. These shippers were trying to reach markets 3,500 miles from their locations. Their competitors were only 1,000 miles from these markets (T. 330). Their products had to be transported three and one-half times as far as their competitors' products. The rates they paid were far less than three and one-half times the rates of their competitors.

The Commission's finding in both decisions (T. 330 and T. 381) that the differences between the assailed and alleged preferential rates are not shown to have been or to be of a character justifying a finding that certain defendants, having effective control of the rates, subjected or subject complainants to undue prejudice, is based on the evidence, and should be affirmed.

Respectfully submitted,

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